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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO GONZALEZ-CORTES,

Defendant and Appellant.

G058014

(Super. Ct. No. 16CF2917)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Robin Urbanski, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Ricardo Gonzalez-Cortes of committing a lewd act on a child under 14 years of age (Pen. Code,<sup>1</sup> § 288, subd. (a); count 1), and sexual intercourse or sodomy with a child ten years old or younger (§ 288.7, subd. (a); count 2). The court sentenced defendant to 25-years-to-life in state prison on count 2 and eight years consecutive on count 1.

On appeal, Gonzalez-Cortes argues his sentence as to count 1 should have been stayed pursuant to section 654. He also argues his case must be remanded for the court to conduct a hearing regarding his ability to pay following the California Supreme Court decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We disagree with both contentions and affirm the judgment.

## **FACTS AND BACKGROUND**

Gonzalez-Cortes was N.'s stepfather; he lived with N. and her mother. When she was six<sup>2</sup> years old, N. told a school supervisor Gonzalez-Cortes was touching her in a sexual manner.

N. later spoke to a social worker and using her own words, said Gonzalez-Cortes would wake her up in the morning before school and put his penis in her anus. N. drew two pictures for the social worker: they showed Gonzalez-Cortes putting his penis in her anus and penetrating her vagina with his penis.

At trial, N. testified Gonzalez-Cortes put his penis inside her vagina and it hurt. She also said Gonzalez-Cortes touched inside her vagina with his hand and he put his penis in her pants "a lot."

At sentencing, Gonzalez-Cortes argued section 654 should apply to his sentence on counts 1 and 2. The court disagreed, concluding section 654 "does not apply

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<sup>1</sup> All further statutory references are to this code.

<sup>2</sup> N. was eight when she testified during Gonzalez-Cortes's trial.

here because Count 1 and Count 2 are based on different criminal acts and their objectives were predominantly independent of each other.” The court then imposed consecutive sentences as to counts 1 and 2.

## **DISCUSSION**

### 1. *Penal Code Section 654*

Gonzalez-Cortes argues the court erred in finding section 654 did not apply to his sentence on count 1. We must disagree.

“Whether section 654<sup>3</sup> applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

“[T]he question of whether the acts of which a defendant has been convicted constituted an indivisible course of conduct is primarily a factual determination, made by the trial court, on the basis of its findings concerning the defendant’s intent and objective in committing the acts. [Citations.] This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.” (*People v. Ferguson* (1969) 1 Cal.App.3d 68, 74-75.)

The record here contains substantial evidence to support the court’s conclusion that counts 1 and 2 were based on different criminal acts. N. described multiple incidents of sexual abuse by Gonzalez-Cortes: (1) she said he put his penis in

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<sup>3</sup> Section 654, subdivision (a), says: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

her vagina; (2) he put his hand in her vagina; and (3) he put his penis in her anus. Each act was described in some detail.

Gonzalez-Cortes argues “[n]othing in the information or the instructions to the jury indicated that the two counts were separate and distinct acts.” He further argues the unanimity instruction given to the jury, a modified version of CALCRIM No. 3501,<sup>4</sup> suggested Gonzalez-Cortes could be convicted of both counts based on a single act.

We again disagree. The court also instructed the jury with CALCRIM No. 3515: “Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.” We must “assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

N. testified that Gonzalez-Cortes sexually assaulted her repeatedly with both his hands and his penis. She was thoroughly cross-examined as to her allegations. The jury then convicted appellant of counts 1 and 2. Standing on its own, N.’s testimony constituted substantial evidence to support the jury’s verdict.

At sentencing, the trial court concluded that the two counts were based on different criminal acts and their objectives were predominantly independent of each other. Section 654 “prohibits multiple punishment for the same ‘act or omission.’”

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<sup>4</sup> The court gave the jury this modified version of CALCRIM No. 3501: “The defendant is charged with the following: [¶] Lewd Act Upon a Child Under 14, [N.], in Count 1 sometime during the period of 11/1/15 and 11/10/16. [¶] Engaging in Sexual Intercourse With Child 10 Years or Younger, [N.], in Count 2 sometime during the period of 11/1/15 and 11/10/16. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed.”

(*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) The court’s findings satisfy the requirements of section 654 and justify the imposition here of consecutive sentences.

2. *Dueñas*

When sentencing Gonzalez-Cortes, the court imposed a \$300 restitution fine (§§ 1202.4, 1202.45), a \$40 court operations fee (§ 1465.8), and a \$30 criminal conviction assessments fee (Gov. Code, § 70373, subd. (a)(1)) on each count.

Gonzalez-Cortes cites *Dueñas* and argues the court erred in imposing court fines and fees without first determining whether he had the ability to pay them. He is wrong. *Dueñas* has no application here.

In *Dueñas*, the court of appeal ruled a homeless mother’s right to due process was violated when she was ordered to pay fines, which given her specific circumstances, she could not afford. (*Dueñas, supra*, 30 Cal.App.5th at p. 1167.) The defendant in *Dueñas* had cerebral palsy, was unable to work, and her family could not afford basic necessities. Her inability to pay earlier traffic citations had resulted in the suspension of her driver’s license, which led to a series of misdemeanor convictions and more fines and fees she could not pay. At sentencing, she requested a hearing and provided evidence she could not afford to pay the fines and fees. (*Id.* at pp. 1162-1163.)

Based on that record, the court of appeal determined “[i]mposing unpayable fines on indigent defendants” amounted to punishing them for their indigence (*Dueñas, supra*, 30 Cal.App.5th at p. 1167): “[b]ecause the only reason *Dueñas* cannot pay the fine and fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional” (*id.* at p. 1160).

Gonzales-Cortez was ordered to pay fines pursuant to the same statute at issue in *Dueñas*, “but there the similarity ends.” (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139 (*Johnson*).) Unlike the defendant in *Dueñas*, he was employed prior to the incident, and he hired an attorney to represent him. From this we can

reasonably infer appellant was not saddled “with a financial burden anything like the inescapable, government-imposed debt-trap [Dueñas] faced.” (*Ibid.*)

Further, because of his 25-years-to-life sentence, Gonzales-Cortez does not face the possibility of reimprisonment if he cannot afford to pay the fines and fees. And his lengthy prison term will afford him an opportunity to earn prison wages over a significant number of years. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant’s ability to obtain prison wages]; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 [restitution fine imposed under section 1202.4 “may be based on the wages a defendant will earn in prison”].) Therefore, any error in failing to hold an ability to pay hearing is harmless, because appellant’s sentence is long enough to afford him the opportunity to pay the fines and fees from his prison wages. (See, e.g., *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; *Johnson, supra*, 35 Cal.App.5th at pp. 139-140.)

### **DISPOSITION**

The judgment is affirmed.

GOETHALS, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.